No. 94-783

Supreme Court, U.S.
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# In The Supreme Court Of The United States

OCTOBER TERM, 1994

PENSACOLA CONSTRUCTION CO.,

*Petitioner,*

v.

TYGER CONSTRUCTION COMPANY, INC.,

*Respondent.*

## ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit erred in reversing and remanding with instructions to vacate certain portions of a jury verdict by holding that the trial judge abused her discretion in admitting opinion testimony of a qualified expert where his opinions were highly speculative, conjectural, without factual support in the record and in direct conflict with facts in evidence.

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## ADDITIONAL PROVISIONS INVOLVED

In addition to the provisions cited by the petitioner, the following provisions are also involved in this case:

FEDERAL RULE OF EVIDENCE 403:

**Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FEDERAL RULE OF EVIDENCE 702:

**Testimony of Experts.** If scientific, technical, or other specialized knowledge will assist the

trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

## STATEMENT OF THE CASE

The petition for writ of certiorari before the Court is the final chapter in a series of protracted litigation between the petitioner, Pensacola Construction Co. ("Pensacola"), and its joint venturer, Tyger Construction Company, Inc. ("Tyger"). The joint venture was formed in August, 1985 to perform a construction contract for the Virginia Department of Highways and Transportation. The principal work of the contract was the construction of two sand islands as part of a bridge-tunnel across the James River at Newport News, Virginia.

Although the parties have litigated a variety of issues related to the joint venture beginning in December, 1988, the instant petition stems from a second

trial of Pensacola's counterclaim alleging that Tyger misrepresented that a particular source of sand for the project, the "Waitman tract," was available and permitted for mining. In fact, the joint venture was unable to use the Waitman tract. Pensacola sought to prove through its only expert witness, H. B. McCoy, that the joint venture incurred additional costs of $9,799,474.00 as a result of the unavailability of the Waitman tract. McCoy arrived at this figure by calculating costs in seven specific categories. Pensacola sought recovery of 40% of this amount, $3,919,790.00, based on its 40% interest in the joint venture.

At a deposition prior to trial, McCoy explained in detail the opinions he was prepared to render at trial on

damages. Once Tyger fully understood his calculations, it filed an extensive motion in limine arguing that McCoy's calculations and theories had no basis in fact. In denying the motion, the trial judge stated:

> In terms of the fact basis, as a general matter, I'm of the opinion that Rule 705 will allow an expert, once they are qualified -- and I think that is a threshold area for any expert -- once an expert qualifies in a particular field, I think that the Court and the jury can consider any opinion that the expert renders. I believe that if an expert doesn't have an adequate fact basis for that opinion, that is a matter to be brought out on cross-examination.
>
> That is your role as an advocate, and then it is your role as an advocate to argue to a jury that this opinion is not properly based in fact, it should not be given much weight by the jury, if any at all. And I think that basically where you say that there are fallacies in the

> analysis and fallacies in the reasoning process and in the bases, that those are matters for cross-examination and argument. I make that a general ruling in regard to what you said.

(J.A., Vol. IV, 1372) (Emphasis added).

The trial court subsequently qualified McCoy "in assessing costs, expenses and losses in projects such as the one in issue in this lawsuit and the preparation of estimates and the review of cost accounting reports, and in the analysis of construction methods for projects such as at issue in this lawsuit." (J.A., Vol. VI, 1795). Consistent with her view that, once qualified, the jury could consider "any opinion that the expert renders," the trial judge permitted McCoy to testify freely to all of his calculations and left it to Tyger to defuse McCoy's

testimony through cross-examination and Tyger's own evidence. Tyger renewed its objections to McCoy's testimony by moving for a directed verdict at the conclusion of Pensacola's evidence (J.A., Vol. VI, 1935-45) and again at the conclusion of all the evidence (J.A., Vol. VII, 2309-67).

The jury was required to return its verdict on a special interrogatories verdict form calculating damages in each of the seven categories. A comparison of McCoy's calculations and the jury's award is as follows:

| | (McCoy Calculation) | (Jury Award) |
|---|---|---|
| 1. Move to Hula/Chisman | $1,187,231 | $ 977,083 |
| 2. Additional Barge Costs | 839,222 | 279,740 |
| 3. Increased Costs of Mining an Uneconomical Sand Pit | 3,043,020 | 1,268,448 |
| 4. Excessive Supervisor Salaries at Sand Pit | 86,260 | 90,543 |
| 5. Excessive DBE Fee Paid for Move to Different Pit | 63,297 | 38,866 |
| 6. Increased Costs Due To Excessive Time | 4,438,794 | 1,270,122 |
| 7. Excessive Costs Due To Subcontract to Great Lakes | 41,650 | 20,825 |
| TOTAL | $9,799,474 | $3,945,627 |
| | x.40 | x.40 |
| | $3,818,790 | $1,578,250 |

(J.A., Vol. VIII, 2564, 2596-97).

Tyger appealed four of the seven categories of the jury's award (item nos. 3-6 above) to the Fourth Circuit Court of Appeals on the ground that the trial judge abused her discretion in admitting McCoy's testimony on these calculations.

Tyger argued that simply because an expert qualifies in a given field does not mean that "any opinion" of that expert arguably within his field of expertise is admissible. Rather, Tyger argued, where the testimony of the expert or other evidence reveals that the expert's opinion has no basis in fact and is based purely on unsupported hypotheses or conjecture, it is the duty of the trial court not to admit the opinion testimony into evidence.

The Court of Appeals agreed. It examined the record in the case focusing on the single issue of "whether McCoy's testimony had any basis in fact." (App. 13).[1] The Court of Appeals found that

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[1] References to the Appendix filed with Pensacola's Petition for Writ of Certiorari are denoted "(App. ___)."

each of the challenged calculations were wholly unsupported by the factual record and that the trial judge abused her discretion in admitting any of the calculations into evidence. Said the Court:

> Scrutiny of expert testimony is especially proper where it consists of "an array of figures conveying a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it." . . . . This is particularly true, in a situation such as this, when an expert has apparently taken factual data from the specific project in dispute, and formulated estimates of damages. Without accurate factual support, the damages calculations were speculative and the district court abused its discretion in allowing McCoy's testimony in the areas discussed above.

(App. 19-20) (citations omitted).

Significantly, the Court of Appeals addressed and distinguished its earlier

decision of Clinchfield R.R. v. Lynch, 784 F.2d 545 (4th Cir. 1986) relied upon by Pensacola. In Lynch, the court affirmed the district court's admittance of an expert's "novel" opinion stating that "[a] court should not exclude expert testimony simply because it involves a new method or novel theory." Id. at 554. The court also noted in Lynch that Federal Rule of Evidence 703 permits an expert to base his opinion testimony on facts or data which need not be admissible in evidence "if of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Id. at 553.

The Court of Appeals in the instant case distinguished Lynch noting that

while the expert's methods were novel in Lynch,

> [h]ere, we have an expert espousing an opinion based on assumptions which find no support in the record. Although McCoy's methods are unusual, the greater danger is that the jury may accept as fact not just the faulty assumptions on which he relied, but may also accept the conclusions that are drawn through his use of these assumptions. When the assumptions made by an expert are not based on fact, the expert's testimony is likely to mislead a jury, and should be excluded by the district court.

(App. 18).

At page 11 of its Statement of the Case, Pensacola asserts that the Court of Appeals made four "implicit and explicit" erroneous holdings. A fair reading of the court's opinion reveals, however, that Pensacola's assertions are untrue.

First, contrary to Pensacola's contention, the Court of Appeals did not

hold that the basis for an expert's opinion must be set forth in the evidence. Indeed, as the court stated, Federal Rule of Evidence 703 provides that the facts and data forming the basis for an expert's opinion "need not be admissible." (App. 18).

Similarly, the Court of Appeals did not hold, as Pensacola asserts, that Pensacola bore the burden of setting forth a factual basis for its expert's conclusions or that whether an expert's conclusions are adequately supported by the evidence in the case is a matter going to the admissibility of, rather than the weight to be given to, the expert testimony.

Rather, the Court of Appeals' holding stands for a single proposition: expert testimony that has no basis in

fact but is instead based on speculation and conjecture (regardless of whether its proponent has attempted to establish a factual basis in its case in chief or whether the lack of a factual foundation is demonstrated through cross-examination), should not be admitted into evidence. As will be demonstrated below, this decision is in accord with the Federal Rules of Evidence and the decisions of this Court and the various courts of appeals construing those rules.

## ARGUMENT

### A. THE DECISION BELOW IS IN ACCORD WITH THE FEDERAL RULES OF EVIDENCE AND DECISIONS CONSTRUING THE RULES.

Pensacola's first argument in support of a writ of certiorari is that "there is confusion and sharp disagreement among the appellate courts"

over whether the "reasonableness" of an expert's conclusions should be determined by the trial judge in deciding whether to admit expert opinion testimony or whether the issue of reasonableness is a matter of weight to be determined by the jury. Pensacola characterizes the decision below as in accord with the "minority view." This argument stems from a fundamental misreading of the Court of Appeals' decision.[2]

First, Pensacola asserts that the Court of Appeals placed "the burden of setting forth the reasonableness of the basis for an expert's opinion on the

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[2] The argument is also misplaced because all but one of the cases cited by Pensacola for the "majority view" were decided prior to this Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., ___ U.S. ___, 113 S.Ct. 2786 (1993), discussed below.

party producing the expert." Petition at 13. This is simply not the case. Nowhere in the Court of Appeals' decision is there a finding that Pensacola had the burden of adducing factual evidence supporting a determination of reasonableness. Similarly, nowhere did the Court of Appeals "require the disclosure of the basis for an expert's opinion as a requirement to its admission." Petition at 15.

To the contrary, the Court of Appeals simply held that once a qualified expert's methodology and basis for his opinion are made known to the trial judge, either through the proponents' own evidence, cross-examination, or proffer outside the hearing of the jury, and upon an objection to the expert's opinion as lacking a rational basis or employing an

unreliable methodology, the trial judge must make a determination whether to admit or refuse the testimony. A trial judge may not, as she did here, simply let the jury "consider any opinion that the expert renders." J.A., Vol. IV, 1372. The trial judge must resist "the temptation to answer objections to receipt of expert testimony with the shorthand remark that the jury will give it 'the weight it deserves.'" Joy v. Bell Helicopter Textron, Inc., 999 F.2d 549, 569 (D.C. Cir. 1993) (quoting In re Air Crash Disaster at New Orleans, 795 F.2d 1230, 1233 (5th Cir. 1986)).

If the trial judge does not resist such temptation, appellate scrutiny, as in the instant case, is required. As the Fifth Circuit aptly stated in Air Crash Disaster:

> [W]e adhere to the deferential standard for review of decisions regarding the admission of testimony by experts. Nevertheless, we take this occasion to caution that the standard leaves appellate judges with a considerable task. We will turn to that task with a sharp eye, particularly those instances, hopefully few, where the record makes it evident that the decision to receive expert testimony was simply tossed off to the jury under a "let it all in" philosophy. Our message to our able trial colleagues: it is time to take hold of expert testimony in federal trials.

Id. at 1234.

In this case, the Court of Appeals undertook the scrutiny that the trial court determined it could forego. In so doing, the Court of Appeals analyzed the entire record and found that McCoy's opinions were "based on faulty assumptions," "not based on fact," and "speculative in nature." (See App. 15, 17, 18, 20).

The Court of Appeals' ruling that opinion testimony so lacking in a reasonable, factual basis should not be admitted is consistent with what has long been the law in the Fourth Circuit. See Cunningham v. Rendezvous, Inc., 699 F.2d 676, 678 (4th Cir. 1983); Eastern Auto Distributors of America, Inc., 795 F.2d 329, 338 (4th Cir. 1986). The ruling is also in harmony with numerous statements from other circuits. See, e.g. Joy v. Bell Helicopter Textron, Inc., 999 F.2d 549, 568-70 (D.C. Cir. 1993) (excluding testimony based solely on guesswork, speculation and conjecture); U.S. v. L.E. Cooke Co., 991 F.2d 336, 342 (6th Cir. 1993) (where expert's testimony amounts to mere guess or speculation, court should exclude testimony; opinion with reasonable factual basis should not be

excluded); Christophersen v. Allied-Signal Corp., 939 F.2d 1106, 1127 (5th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1280 (1992) (if record establishes a critical fact contrary to the expert's testimony, or if court may take judicial notice of fact that fatally contradicts assumption of expert, then testimony should be excluded); Coal Resources, Inc. v. Gulf & Western Industries, 865 F.2d 761, 772 n. 4 (6th Cir. 1989)(liberalization under F.R.E. 703 of type of information on which expert may base opinion has not eliminated requirement that expert ground opinion on reliable data rather than pure speculation); Jones v. Otis Elevator Co., 861 F.2d 655, 662 (11th Cir. 1988)("relevant testimony from a qualified expert is admissible only if

the expert knows of facts which enable him to express a reasonably accurate conclusion as opposed to conjecture or speculation"); In re Air Crash Disaster at New Orleans, 795 F.2d 1230, 1231-35 (5th Cir. 1986) (opinions of expert should not have been admitted where assumptions were "so abusive of the known facts, and so removed from any area of demonstrated expertise, as to provide no reasonable basis" for calculating damages).

In sum, the trial judge in the instant case did not understand her role in determining the admissibility of expert opinion evidence. She mistakenly ruled that a trial court's inquiry concludes with a determination that a witness qualifies as an expert.

As recognized by various courts of appeals, and as explained more fully by

this Court recently in Daubert, discussed below, a trial judge must go beyond the issue of qualification. The Court of Appeals in this case performed the task which the trial judge declined to undertake. Its decision is in accordance with the Federal Rules of Evidence and should not be reviewed.

**B. THE DECISION BELOW IS IN ACCORD WITH DAUBERT v. MERRELL DOW PHARMACEUTICALS, INC.**

Pensacola next argues that the Court of Appeals' decision conflicts with this Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., ___ U.S. ___, 113 S.Ct. 2786 (1993). As with Pensacola's other arguments, this position is not well-taken.

In Daubert, this Court granted certiorari "in light of sharp divisions

among the courts regarding the proper standard for the admission of expert testimony." Id. at 2792. While noting that the Federal Rules of Evidence embody a "general approach of relaxing traditional barriers to 'opinion' testimony," id. at 2790 (quoting Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169, 109 S.Ct. 439, 450, 102 L.Ed.2d 445 (1988)), the Court also emphasized that "the Rules of Evidence -- especially Rule 702 -- assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." Daubert, 113 S.Ct. at 2799.

Thus, Rule 702 permits an expert to testify only when "scientific, technical, or other specialized knowledge will assist the trier of facts to understand

the evidence or to determine a fact in issue." F.R.E. 702 (emphasis added). "The word 'knowledge' connotes more than subjective belief or unsupported speculation." Daubert, 113 S.Ct. at 2795. Accordingly, said this Court, expert testimony must meet "a standard of evidentiary reliability." Id.[3] In determining reliability, it falls to the trial judge to undertake "a preliminary assessment of whether the reasoning or methodology underlying the testimony is

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[3] The Court in Daubert limited its discussion of the admissibility of expert testimony to scientific matters. A number of courts, however, have applied its rationale in rejecting non-scientific expert testimony. See, e.g., Wilson v. City of Chicago, 6 F.3d 1233 (7th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1844 (1994); Frymire-Brinati v. KPMG Peat Marwick, 2 F.3d 183 (7th Cir. 1993); Joy v. Bell Helicopter Textron, Inc., 999 F.2d 549 (D.C. Cir. 1993); Marcel v. Placid Oil Co., 11 F.3d 563 (5th Cir. 1994); O. L. McLendon v. Georgia Kaolin, 841 F. Supp. 415 (M.D. Ga. 1994).

scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Id. at 2796.

Here, the trial judge eschewed her duty of making any preliminary assessment, allowing every utterance of the expert to be evaluated by the jury. This, the Court of Appeals correctly noted, was abuse of discretion. See Frymire-Brinati v. KPMG Peat Marwick, 2 F.3d 183, 186-87 (7th Cir. 1993).

In addition to being reliable, Rule 702 also requires that the evidence or testimony be relevant, i.e., that it "assist the trier of fact to understand the evidence or to determine a fact in issue." F.R.E. 702; Daubert, 113 S.Ct. at 2795. Additionally, the expert testimony must be "sufficiently tied to

the facts of the case that it will aid the jury in resolving a factual dispute." Id. (quoting United States v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985)).

In the case at bar, the Court of Appeals did not reference Rule 702 or the Daubert decision. However, it found the assumptions made by McCoy "not based on fact" and "likely to mislead a jury." (App. 18). Without specifically saying so, the Court of Appeals correctly found McCoy's opinions not sufficiently tied to the facts of the case and therefore not relevant.[4]

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[4] Even had the trial court determined McCoy's opinions to be relevant, upon Tyger's objections to admissibility and pursuant to F.R.E. 403, it should have weighed the probative value of the testimony against any danger of misleading or confusing the jury to determine if the testimony should have been excluded. See, e.g., American Bearing Co. v. Litton Industries, 729 F.2d 943, 949 n. 14 (3d Cir. 1984). The trial court made no analysis.

In sum, Federal Rules of Evidence 403 and 702, among others, required the trial judge to scrutinize more than Mr. McCoy's credentials for qualification. As the Court of Appeals opinion makes amply clear, had the judge followed Tyger's repeated urging and probed the methodology and bases of McCoy's opinions, she would have discovered rank speculation and wholly unsupported assumptions.

The Court of Appeals' decision to reverse the judgment against Tyger for abuse of discretion is consistent with the Rules of Evidence and this Court's opinion in Daubert. Tyger respectfully submits that for this reason, too, the petition should be denied.

## C. THE DECISION BELOW DOES NOT VIOLATE THE SEVENTH AMENDMENT GUARANTEE OF TRIAL BY JURY.

Continuing its misconstruction of the decision below, Pensacola last argues that the Court of Appeals' decision violated Pensacola's Seventh Amendment right to trial by jury. It bases this argument on a fundamental misunderstanding between the admissibility of expert testimony (a decision for the court) and the weight to be given such testimony once it is admitted (a decision for the finder of fact). At pages 26-27 of its petition, Pensacola confuses this critical distinction and erroneously suggests that the Court of Appeals' decision requires trial courts to weigh opinion testimony against other evidence to determine admissibility.

No such inference can be drawn from the decision below. As previously explained, the Federal Rules of Evidence provide the framework governing the admissibility of expert opinion testimony. This Court in Daubert provided clarification and additional considerations for courts to follow in determining questions of admissibility.

Pensacola's central theme seems to be nothing more than an attempt to support the trial court's erroneous ruling that it was the jury's function to determine the reliability of a qualified expert's methodologies, hypotheses and factual bases. As Daubert and the myriad of court decisions discussing the admissibility of expert testimony point out, this proposition is not so.

The trial judge serves as "gatekeeper," Daubert, 113 S.Ct. at 2798, assuring, among other things, that an expert is qualified, that the methodologies he employs are reliable, and that his testimony is relevant. The decision of the Court of Appeals in the instant case does no more than emphasize the trial court's abdication of these responsibilities by performing the analysis which should have been undertaken by the trial judge. The Court of Appeals' analysis points out the numerous and serious deficiencies in the underpinnings of McCoy's opinions. Accordingly, the decision of the Court of Appeals was correct and should stand.

## CONCLUSION

Pensacola's central theme is that there is controversy among federal courts of appeals regarding the proper procedure for admitting expert testimony. Yet this Court in Daubert, a decision just over a year old, addressed in detail the proper standards for admission of expert testimony. The decision of the Court of Appeals is in accord with Daubert and the Federal Rules of Evidence. Accordingly, the Petition before the Court presents no issues which this Court, in its discretion, need review. Thus, respondent respectfully requests that certiorari be DENIED.

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